Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF
MFS COMMUNICATIONS COMPANY, INC.

Numbering, Access to Rights of Way and Public Notice of Technical Changes

David N. Porter
Vice President, Government Affairs

MFS COMMUNICATIONS
COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709

Andrew D. Lipman
Mark Sievers
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for
MFS Communications Company, Inc.

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Summary

Numbering Issues. MFS urges the Commission to promptly appoint an independent number administrator. Until the independent number administrator is appointed and operational, it is critical that the Commission strictly enforce its guidelines designed to guarantee competitively neutral number administration.

MFS supports use of the *Ameritech Order* to provide guidance for state regulators in addressing number exhaust within an area code, but suggests three clarifications. First, if a state implements an overlay plan, it should also require 10-digit dialing for all services and providers in the affected area codes. Second, overlays should not be implemented unless and until number portability is implemented. Third, even if number portability is implemented, an overlay should be permitted only if every local exchange carrier authorized to operate in the affected area codes can receive at least one NXX code for each of its exchange areas from the original area code. This would assure that incumbent carriers would not monopolize assignment of numbers from the original area code and stigmitize competitors' or wireless carriers' customers.

The Commission should prohibit any dialing plans that would force competitive local exchange carriers to adopt non-standard dialing. The Commission should also endorse a single presubscription plan for intraLATA calling (2-PIC) so as to minimize the costs new entrants face when offering service throughout the country. Competitive local exchange carriers be required to implement intraLATA presubscription no sooner than the Bell Operating Companies.

MFS recommends that the Commission implement the same cost recovery principles for dialing parity that MFS advocated in its comments in CC Docket 95-116 (Telephone Number Portability). Specifically, the Commission should distinguish between: (1) the common or

shared costs incurred to establish, maintain and administer dialing parity; and, (2) the costs which each individual carrier must incur to conform its own network, its own operating, signaling and routing procedures and its own operational and administrative support systems. It is appropriate that the common or shared costs be recovered through competitively neutral charges to other carriers, however, it is entirely inappropriate in a competitive environment that an individual carrier's costs be recovered from its competitors.

Access to Rights of Way. "Rights of way" should include, among other things, manholes, cable entrance ways into buildings, telephone equipment rooms and wiring closets, and local exchange carrier-controlled risers, conduits, and lateral ducts within the common areas of multitenant buildings and within local exchange carrier premises (collectively referred to as "pathways"). It is important that the Commission broadly define access to pathways since competition can be completely stymied when incumbents enjoy exclusive access to building entrances and demarcation points in multiunit buildings, and exert exclusive control over building ducts, risers, telephone equipment rooms and wiring closets.

Nondiscriminatory access means that a LEC may not deny another telecommunications carrier access to its pathway for *any* reason other than those specifically authorized by Sec. 224(f)(2) (insufficient capacity and reasons of safety, reliability and generally applicable engineering purposes). Contrary to the claims made by some commentors, prohibiting discriminatory access to pathways, as required by the Act, is not an unconstitutional taking because it does not meet any of the Court's criteria for takings.

Whether there is sufficient capacity for another carrier's facilities depends on individual facts, but access should not be refused due to insufficient capacity if it is possible to rearrange

existing facilities to accomodate a new user. Consistent with a nondiscrimination requirement, the Commission's rules should not allow pathway owners to reserve unused space for their own future use unless they also provide the same opportunity for future expansion to others.

A utility should not be allowed to deny access for safety reasons unless its decision is clearly based on published and accepted safety or engineering standards, such as the National Electric Code, identified in advance, to prevent an incumbent carrier from using safety concerns as a pretense for discrimination. In addition, pathway owners' abilities to levy fees for engineering reviews of proposed installations should be limited, as incumbents have historically charged exorbitant fees for doing routine reviews of proposed access to their pathways.

MFS suggests that the Commission require at least 90 days written notice by pathway owners who intend to modify or relocate attachments or other access to their pathways and that the assessment of costs associated with modification of access should apply only when there is some improvement or change in the nature of the attachment.

Public Notice of Technical Changes. Public of notice of technical changes is required to assure the interoperability of interconnected networks and is a duty imposed on incumbents to assure that they will not use their control over network standards to harm competition. Notice of technical changes should be provided by incumbents through public forums (*e.g.*, a posting on the Internet and announcements at industry forums) and written notice delivered by certified mail to any carrier with whom the incumbent has an interconnection or access agreement. The notification periods should vary by classification. Major changes should require a minimum of 18 months notice; location changes should require 12 months notice; and, minor changes should be governed by industry practice as outlined by the Industry Carriers Compatibility Forum.

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Numbering, Access to Rights of Way and Public Notice of Technical Changes

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits these reply comments regarding the issue categories listed in ¶290 of the *Notice of Proposed Rulemaking* in the above-captioned docket ("Notice").

I. NUMBERING ISSUES

The comments addressed two major numbering issues: (1) number administration issues including the need for neutral numbering administration and the states' appropriate roles in dealing with number exhaust within an Number Plan Area ("NPA" or area code); and, (2) issues surrounding dialing parity, including intraLATA dialing parity, local service dialing parity, access to operator services, and recovering the costs of dialing parity.

A. Neutral Number Administration and States' Roles in Number Exhaust within an NPA (¶¶ 250-258)

In its comments, MFS urged the Commission to promptly appoint an independent number administrator. MFS also supported use of the *Ameritech Order*[1/] to guide state regulators in addressing number exhaust within an NPA, but suggested three clarifications. First, if a state implements an overlay plan, it should also require every carrier to implement 10-digit dialing for all local services in the affected area codes. Second, overlays should not be implemented unless and until service provider number portability is implemented. Third, even if number portability is implemented, an overlay should be permitted only if every local exchange carrier ("LEC") authorized to operate in the affected NPAs can receive at least one NXX code for each of its exchange areas from the original area code.[2/] This would assure that incumbent local exchange carriers ("ILECs") would not monopolize assignment of numbers from the original NPA and stigmatize competitive local exchange carrier ("CLEC") or wireless customers.[3/]

1. Neutral Number Administrator

Many commentors urged the Commission to make the North American Numbering Council ("NANC") a functional entity and direct it promptly to appoint the independent

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1/ *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech -- Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995).

2/ The assignment of NXXs for each exchange area depends, of course, on how such areas are defined. MFS is not suggesting that each LEC receive an NXX for every rate center it might have within an affected NPA as there would probably be insufficient numbers available for such an assignment. However, a LEC should be assigned at least one NXX for each affected NPA.

3/ MFS Comments at pp. 7-9.

numbering administrator.[4/] Since the Commission has not appointed members of the NANC, the NANC has not met to select the North American Numbering Plan ("NANP") administrator. Many commentors emphasized the urgency for the Commission to appoint an independent numbering administrator and expressed frustration with Bellcore and the ILECs' continuation of their number administration roles.[5/] Omnipoint, for example, described its experience and inability to obtain a general purpose NPA code pursuant to the guidelines established by the Industry Carriers Compatibility Forum ("ICCF"). Omnipoint's request for a general purpose NPA was referred by the current North American Numbering Plan Administrator (Bellcore) to the Industry Numbering Committee ("INC") for resolution. After debating Omnipoint's application for five months, without discussion every LEC representative summarily voted against Omnipoint's proposal.[6/]

Unfortunately, appointment of a neutral administrator will not take place in the near future. BellSouth most graphically described the time frame:

> The North American Numbering Council ("NANC") has 180 days to select a new administrator; after the 180th day the transfer of responsibilities takes place in 90 days, and central office code assignment functions, perhaps the biggest source of contention for the LECs who must administer and implement this function, do not have to be transferred for another 18 months. Thus, full implementation may not take place for a period of 2 years and 3 months. The problem is that the triggering

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4/ See, *e.g.*, BellSouth Comments at pg. 19; State of California and Public Utilities Commission of the State of California Comments at pg. 7; Cellular Telecommunications Industry Association Comments at pg. 4; Frontier Comments at pg. 5; GTE Comments at pg. 30; MCI Comments at pg. 10; MFS Comments at pg. 7; Omnipoint Comments at pp. 3- 4; and USTA Comments at pg. 15.

5/ See, *e.g.*, Cellular Telephone Industry Association Comments at pp. 4-5; and, MCI Comments at pp. 10-11.

6/ Omnipoint Comments at pp. 1-2.

> effect for all this, appointment of NANC members, has not yet taken place and there is no indication of when this event will happen.[7/]

Only Southwestern Bell advocated a delay in the transfer of numbering responsibilities to the NANC and the independent number administrator, arguing that central office code assignment issues were complex and should be fully resolved before transfer to the NANC.[8/] The Commission should not be swayed by Southwestern Bell's singular concerns about the complexity of central office code assignments.

A number of commentors observed that, of necessity, Bellcore and the ILECs will have to continue to serve in their numbering administration roles until the independent number administrator is selected.[9/] Some commentors described the competitive problems that continue so long as the ILECs control number assignment.[10/] Given the inevitable delays before an independent number administrator will be operational, it is critical that the Commission strictly enforce the guidelines designed to guarantee competitively neutral number administration. In the interim, the Commission should promptly appoint the members of the NANC.

7/ BellSouth Comments at pg. 19 [emphasis added].

8/ Southwestern Bell Comments at pp. 11-13.

9/ See, *e.g.*, BellSouth Comments at pg. 20; State of California and Public Utilities Commission of California Comments at pg. 7; GTE Comments at pg. 30; NYNEX Comments at pg. 18; Pennsylvania Public Utility Commission Comments at pg. 6; USTA Comments at pg. 15; and, US West Comments at pg. 3.

10/ See, *e.g.*, Cellular Telephone Industry Association Comments at pp. 4-5; MCI Comments, Attachment D, Affidavit of James Joerger; Omnipoint Comments at pp. 1-2; and, Sprint Comments at pp. 13-14.

2. *State Regulators' Numbering Role.*

Most commentors agreed with the Commission's conclusion that the 1996 Act gives it "exclusive jurisdiction" over numbering issues, but that it may delegate "to state commissions or other entities all or any portion of such jurisdiction."[11/] Most commentors agreed[12/] with the Commission's conclusions in the Notice that the Commission should delegate to states the implementation of new area codes subject to the guidelines set out in the *Ameritech Order*.[13/] Only a few commentors suggested that states should have broader authority to decide whether to apply an overlay or split to address number exhaustion within an area code.[14/] Nevertheless, commentors suggested three major modifications or amplifications of the *Ameritech Order*:

- ***Ban Service-Specific Overlays***. Some commentors suggested that Commission strictly prohibit service specific overlays (*e.g.*, assigning new NPAs to wireless carriers) as a mechanism for addressing number exhaust.[15/]

11/ Notice at ¶ 250 citing Sec. 251(e)(1).

12/ See, *e.g.*, Bell Atlantic Comments at pg. 8; State of California and Public Utilities Commission of California Comments at pg. 8; Cellular Telecommunications Industry Association Comments at pp. 5-6; Cox Communications Comments at pp. 3-6; MCI Comments at pg. 11; Pennsylvania Public Utilities Commission Comments at pp 5-6; Southwestern Bell Comments at pp. 10-11; Time Warner Comments at pg. 20; and, US West Comments at pg. 2.

13/ Notice at ¶¶ 254-258. *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech -- Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995).

14/ See, *e.g.*, BellSouth Comments at pp. 19-20; and, PageNet Comments at pg. 8.

15/ See, *e.g.*, MCI Comments at pg. 11 (geographic splits are preferred); PageNet Comments at pp. 23-24 (service specific overlays should be illegal); and, South-western Bell Comments at pg. 11 (wireless-only overlays should be considered a *per se* violation of the Communications Act).

- ***Mandatory 10-Digit Dialing***. Some commentors argued that if overlays are allowed, the Commission should require mandatory 10 digit dialing for all local calls within and between the new area codes to avoid placing CLECs and wireless carriers at a competitive disadvantage.[16/]

- ***Prohibit Overlays Until and Unless Permanent Number Portability is Implemented.*** Several commentors argued that overlays should be prohibited until and unless permanent number portability is implemented.[17/]

In instances where overlays cannot be avoided, in addition to requiring number portability and mandatory 10 digit dialing, MCI suggested assigning all remaining NXXs in the old NPA to CLECs to minimize the competitive disadvantage experienced by such carriers.[18/] Likewise, MFS suggested that in overlay situations even when local number portability is implemented, every LEC authorized to operate within the NPA should receive one NXX block of numbers for each of its exchange areas from the original NPA.[19/] Such a requirement would limit the ability of ILECs to assign 7-digit numbers to their customers and 10-digit numbers to CLEC customers.

Only PageNet argued extensively against splits and in favor of overlays. It argued that all-service overlays with mandatory 10-digit dialing was the most efficient, least time-consuming

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16/ See, *e.g.*, State of California and Public Utilities Commission of California Comments at pg. 8; MCI Comments at pg. 11; and, MFS Comments at pg. 8.

17/ See, *e.g.*, National Cable Television Association Comments at pg. 10; State of California and Public Utilities Commission of California Comments at pg. 8; MCI Comments at pg. 11; and, MFS Comments at pg. 8.

18/ MCI Comments at pg. 11.

19/ MFS Comments at pp. 11-12.

method of addressing number shortages (area code splits have taken more than a year to implement), and that state commission resolution of numbering shortages, even when they apply the principles from the *Ameritech Order*, has historically disadvantaged wireless providers.[20/] It emphasized that as state commissions wrestle with schemes to preserve 7-digit dialing, artificial number shortages are created, which typically harm new competitors and are not resolved in a timely fashion. It also argued that the utility of area code splits diminishes as area codes are split, shrinking the areas covered by area codes.[21/] Essentially, PageNet argues that the Commission should recognize that the days of 7 digit local dialing in major metropolitan areas are limited.

B. Dialing Parity (¶¶ 202-219)

In its comments, MFS recommended that the Commission prohibit any dialing plans that would force CLECs to adopt non-standard dialing for local calls. MFS also recommended that the Commission endorse a single presubscription plan for intraLATA calling so as to minimize the costs new entrants face when offering service throughout the country. MFS also suggested that CLECs should be required to implement intraLATA presubscription no sooner than the Bell Operating Companies ("BOCs"), and that customer education about presubscription choices should be the responsibility of long distance providers.[22/]

[20/] PageNet Comments at pp. 6-7, 11-12 and 17-20.

[21/] PageNet Comments at pp. 21-22, and note 23.

[22/] MFS Comments at pp. 3, 5-7.

1. Local Service Dialing Parity and Dialing Delays.

There was little, if any, debate with the notion that customers making local telephone calls should not be required to dial special access codes or dial any extra digits to use CLEC services. But some commentors observed that local dialing parity exists whenever CLECs acquire a central office code.[23/] Of course, this would only be true if the CLEC code was a commonly used NPA code and no special dialing protocol was required to originate or terminate calls to CLEC customers. Commentors also generally agreed that a competitively neutral measure of dialing delay should be applied and that the Commission should measure dialing delay as the time when dialing begins and the call is handed to a CLEC.[24/] GTE argued that it was too early to define and measure dialing delay, and advised the Commission to wait until permanent number portability is implemented.[25/] MFS agrees.

2. Operator Services, Directory Assistance, Directory Listing.

Commentors generally recognized that it is important that customers have access to operator services, directory assistance and a directory listing. However, some commentors observed that the 1996 Act requires that ILECs provide CLECs with nondiscriminatory access to operator services, directory assistance and directory listings, but it does not obligate ILECs to

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23/ See, *e.g.*, Southwestern Bell Comments at pg. 8; and US West Comments at pg. 4.

24/ See, *e.g.*, GVNW Comments at pg. 8; NYNEX Comments at pp. 9-10 (advocating a maximum 5 second dialing delay, the same standard as applies to 800 dialing delays); and Sprint Comments at pg. 10.

25/ GTE Comments at pp. 19-20.

provide such services to CLEC customers,[26] and some ILECs argued that they were already providing non-discriminatory access to their operator services so the Commission need not define a right to resell such services.[27]

In contrast, Bell Atlantic argued that the obligation to resell extends only to telecommunications services and not to information services, and observed that some aspects of its operator services are information services, but in a footnote it cryptically observed that aspects of Directory Assistance, while not a telecommunications service, were properly considered part of a customer's basic local service.[28] US West argued that it should not be required to offer operator services, directory assistance or directory listing services to competitors.[29] NYNEX also argued that it is not required to offer its operator services for resale, but it may voluntarily provide them if it chooses to do so.[30] Southwestern Bell argued that operator services should not be offered as an unbundled network element (but provided via negotiated agreements) and Cincinnati Bell argued that access to operator services was included as a component of unbundled switch ports purchased by CLECs.[31]

26/ See, *e.g.*, Bell Atlantic Comments at pp 6-7; and, USTA Comments at pp 6-7.

27/ See, *e.g.*, GTE Comments at pp 17-18; and, Pacific Bell Comments at pg. 15.

28/ Bell Atlantic Comments at pg. 8, footnote 18 where it observes "DA typically is not a stand-alone telecommunications service offered to retail customers. Particularly in light of free call allowances and discounts required by state commissions, it should be viewed as a part of a customer's basic local exchange service."

29/ US West Comments at pp. 9-10.

30/ NYNEX Comments at pg. 7.

31/ Southwestern Bell Comments at pg. 6; and, Cincinnati Bell Comments at pg. 6.

The range of comments and perceptions about the duties associated with the provision of operator services, directory assistance and directory listings -- some ILECs say they already provide access, some say they are not obligated to offer such offerings for resale, some assert that they are included in various unbundled elements or that they should not be unbundled -- underscores the need for an unambiguous national policy. ILECs should not be allowed to unilaterally decide whether, or to what extent to offer access to operator services, directory assistance of directory listings. As the Rural Telephone Coalition points out in its comments, smaller LECs often do not offer operator services but resell services of other ILECs.[32/] Denial of operator services or directory assistance for resale as suggested by some ILECs would be anticompetitive by effectively prohibiting smaller ILECs and CLECs from obtaining operator services or directory assistance and thereby raising rivals' costs and restricting competitors' abilities to enter the market and compete with a full range of services. As suggested in the Notice, the Commission should simply require that ILECs provide nondiscriminatory access to operator services and directory assistance, and that such offerings include the duty to offer such services for resale.[33/] Similarly, AT&T's suggestion that the duty to provide operator services should include an obligation to resell emergency interrupt, busy line verification and operator-assisted directory assistance[34/] is an appropriate addition to Commission rules in this area.

32/ Rural Telephone Coalition Comments at pg. 7.

33/ Notice at ¶ 216-217.

34/ AT&T Comments at pg. 8, note 11.

3. *IntraLATA Presubscription.*

The commentors generally supported presubscription as the mechanism for achieving intraLATA dialing parity, but many argued that the states should decide the form of presubscription, not the Commission.[35/] The Pennsylvania Public Utilities Commission, for example, sharply disagreed with the Commission's conclusion that the 1996 Act empowered the Commission to mandate intraLATA dialing parity.[36/] Commentors generally supported either full 2-PIC (Presubscribed Interexchange Carrier) or modified 2-PIC[37/] as the appropriate pre-subscription methodology.[38/] AT&T argued that the modified 2-PIC method inappropriately limits customers' choices for intraLATA toll by requiring them to pick either their local service provider or their interLATA service provider,[39/] and that basically, under a modified 2-PIC

35/ See, *e.g.*, Bell Atlantic Comments at pp. 2-6; BellSouth Comments at pp. 9-10; Frontier Comments at pg. 2; GTE Comments at pg. 9; Lincoln Telephone Comments at pg. 2; Pacific Bell Comments at pp. 9-13; USTA Comments at pg. 2; and, US West Comments at pg. 7.

36/ Pennsylvania Public Utilities Commission Comments at pg. 2.

37/ Full 2-PIC allows customers to select different carriers to provide its 1+ interLATA and intraLATA service provider. Modified 2-PIC allows customers to select either their presubscribed long distance carrier or their local exchange carrier to be their intraLATA service provider.

38/ See, *e.g.*, AT&T Comments at pp. 4-5; Bell Atlantic Comments at pp. 3-4; BellSouth Comments at pg. 10; Frontier Comments at pp. 1-2; General Communications Inc. Comments at pg. 2 (2 PIC implemented in Alaska); GTE Comments at pg. 9; Michigan Public Service Commission Staff Comments at pg 4; NextLink Comments at pg. 9; NYNEX Comments at pg. 6; Pacific Bell Comments at pg. 11; Pennsylvania Public Utilities Commission Comments at pg. 2; Southwestern Bell Comments at pg. 3; Sprint Comments at pp. 3-4 (modified 2-PIC); Telecommunications Resellers Association Comments at pg. 3; USTA Comments at pg. 3 (modified 2-PIC); and US West Comments at pg. 5.

39/ AT&T Comments at pp. 5-6.

approach, intraLATA toll would become an add-on for either the local service provider or the long distance provider. Most commentors opposed balloting or a Commission requirement that ILECs notify customers of presubscription choices.[40/] MFS supports 2-PIC.

Commentors also generally agreed that 1996 Act's statutory requirement of intraLATA dialing parity applied only to the Bell Operating Companies ("BOCs") and GTE.[41/] BellSouth suggested that, as a matter of policy, the BOCs' intraLATA dialing parity requirements should be extended to independent telephone companies when the independent companies are allowed to offer interLATA services or no later than February 8, 1999.[42/] In contrast, US West argued that intraLATA dialing parity should not be extended to independent telephone companies.[43/]

The comments show that there is broad consensus around a 2-PIC presubscription method. The Commission should establish 2-PIC as the national standard in order to minimize customer confusion and the compliance costs (*e.g.*, software loaded into switches and training personnel to handle customer inquiries and presubscription requirements) and streamline efforts of new entrants and incumbents seeking to provide service throughout the nation. The Commis-

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40/ See, *e.g.*, BellSouth Comments at pg. 10; Frontier Comments at pg. 4; General Services Administration and Department of Defense Comments at pg. 6; GTE Comments at pg. 12; Lincoln Telephone Comments at pg. 3; Michigan Public Service Commission Staff Comments at pg. 2 (balloting is appropriate only in unconverted end-offices); Southwestern Bell Comments at pg. 4; Sprint Comments at pg. 7; USTA Comments at pg. 4; and, US West Comments at pg. 7. However, see Telecommunications Resellers Association Comments at pg. 5 for the contrary position supporting balloting.

41/ See, *e.g.*, Sprint Comments at pp. 8-9; and, US West Comments at pp. 4-5.

42/ BellSouth Comments at pp. 11-12.

43/ US West Comments at pp. 4-5.

sion should recognize that rules for intraLATA presubscription are transitory. At some point, when the BOCs and GTE are authorized to provide both interLATA and intraLATA service, the distinctions between interLATA and intraLATA calls will no longer be meaningful, and the Commission should be prepared to revisit and eliminate these distinctions.

4. Cost Recovery for Dialing Parity.

There was little consensus regarding recovery of the costs of dialing parity. Some commentors argued that states should determine the appropriate cost recovery.[44/] AT&T argued that only the incremental costs of achieving dialing parity (excluding revenue losses and general network upgrades) should be recovered via a presubscribed line charge like the equal access recovery charge mechanism.[45/] In contrast, Southwestern Bell argued that all of the costs of implementing dialing parity should be recovered from charges to cariers, including directly assignable costs (*e.g.*, end office software, STP augmentation) and the shared costs including that portion of infrastructure investment (*e.g.*, AIN) necessary to provide dialing parity.[46/] Commentors generally favored recovering dialing parity costs either based on telecommunication

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44/ See, *e.g.*, GTE Comments at pp 19-20; and, Pacific Bell Comments at pg. 16.

45/ AT&T Comments at pg. 7. See also, GVNW Comments at pg. 6 for support of equal access recovery mechanism.

46/ Southwestern Bell Comments at pp. 8-9.

revenues (gross revenues or revenues net of payments to intermediaries),[47] or based on presubscribed lines.[48]

As a general matter, MFS recommends that the Commission implement the same cost recovery principles for dialing parity that MFS advocated in its comments in CC Docket 95-116 (Telephone Number Portability).[49] Specifically, the Commission should distinguish between: (1) the common or shared costs incurred to establish, maintain and administer dialing parity; and, (2) the costs which each individual carrier must incur to conform its own network, its own operating, signaling and routing procedures and its own operational and administrative support systems. It is appropriate that the common or shared costs be recovered through charges to other carriers, however, it is entirely inappropriate in a competitive environment that an individual carrier's costs be recovered from its competitors. If all carriers must modify their systems and networks to accommodate presubscription, it is not sensible competitive policy to allow one group of competitors (*i.e.*, the BOCs and GTE) to recover their individual costs from competitors (intraLATA toll carriers) while other competitors (CLECs, wireless providers and toll carriers) are forced to bear their own costs of upgrading to comply with a presubscription requirement.

47/ See, *e.g.*, General Communications Inc. Comments at pg. 6; National Cable Television Association Comments at pg. 11; and, Telecommunications Resellers Association Comments at pp. 10-11.

48/ See, *e.g.*, AT&T Comments at pg. 7; and, GVNW Comments at pg. 6.

49/ MFS Comments in *Telephone Number Portability*, CC Docket 95-116, DA 96-358 (filed March 29, 1996).

II. ISSUES RELATING TO RIGHTS OF WAY (¶¶220-225)

A. Access Rights that Should be Included in Rights of Way

While most of the access to rights of way comments focused on access to poles and pole attachments, in its comments, MFS argued that "rights of way" should include, among other things, manholes, cable entrance ways into buildings, telephone equipment rooms and wiring closets, and LEC-controlled risers, conduits, and lateral ducts within the common areas of multitenant buildings and within LEC premises (collectively referred to as "pathways").[50/] Other commentors also urged the Commission to broadly define rights of way to include all pathways used to place facilities, including all easements owned or controlled by a LEC, such as entrance facilities, telephone closets or equipment rooms, etc.[51/] It is important that the Commission broadly define access to pathways since competition can be completely stymied when ILECs enjoy exclusive access to building entrances and demarcation points in multiunit buildings, and exert exclusive control over building ducts, risers, telephone equipment rooms and wiring closets.[52/] Attached to these comments is the Affidavit of Myra Stilfield, which was recently filed by MFS as part of its reply comments in CC Docket 95-184. It provides several real-world examples of buildings where the ILEC serves all tenants, but MFS is unable to secure access to the building or is forced to pay exorbitant fees for access that the ILEC largely does not face. Thus, if the pro-competitive intent of the 1996 Act is to be realized, it is important that the

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50/ MFS Comments at pg. 9.

51/ See, *e.g.*, AT&T Comments at pp. 14-15; and NextLink Comments at pg. 5.

52/ See, *e.g.*, ALTS Comments at pg. 7 and ACSI Comments at pg. 5.

Commission broadly define rights of way to encompass all ILEC-controlled bottlenecks (including building access) and not just telephone poles.

Some ILECs argued that pathways should be narrowly defined to include only public rights of way, and exclude private easements.[53/] Some argued that LECs cannot grant access to what they do not have, and thus, private easements restricted to a given carrier should be excluded from the pathways that a LEC has a duty to provide access to.[54/] The argument is entirely without merit. The 1996 Act does not distinguish between private easements and public pathways when it creates "the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services." If the Commission distinguishes between private easements and public pathways, it will create an incentive for ILECs to avoid their duty to provide access to pathways simply by reclassifying various pathways as private easements. If an ILEC controls a public right of way or possesses an easement over private property, it should be required to provide access to that pathway or easement to competing providers of telecommunications services.

B. What Constitutes Nondiscriminatory Access to Pathways

In its comments, MFS argued that nondiscriminatory access means that a LEC may not deny another telecommunications carrier access to its pathway for *any* reason other than those

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53/ See, *e.g.*, BellSouth Comments at pg. 17.

54/ See, *e.g.*, Ameritech Comments at pg. 38; NYNEX Comments at pg. 12; Pacific Telesis Comments at pp. 22-23; PECO Energy Comments at pg. 2; Rural Telephone Coalition Comments at pg. 13; Southwestern Bell Comments at pg. 20; and, US West Comments at pg. 17.

specifically authorized by Sec. 224(f)(2) (insufficient capacity and reasons of safety, reliability and generally applicable engineering purposes).[55/] Similarly, the Infrastructure Owners[56/] argued that "nondiscriminatory access" should be viewed as the provision of similar space and attachment opportunities to a telecommunications carrier or a cable television operator on a first-come, first-served basis, where the utility, in compliance with the National Electrical Safety Code ("NESC") and other safety standards, has determined that there is sufficient pole capacity, subject to engineering standards, as determined by the utility, on a pole-by-pole basis.[57/] Other commentors suggested that granting access on a first-come, first-served basis would not be unreasonable discrimination since no one would be granted a particular right of way.[58/] General Communications Inc. and MCI argued that nondiscriminatory access requires that the access for competitive carriers must be the same as the access enjoyed by the ILEC,[59/] a principle that many

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55/ MFS Comments at pp. 9-10.

56/ Infrastructure Owners include: American Electric Power Service Corp.; Baltimore Gas and Electric Co.; Commonwealth Edison Co.; Duke Power Co.;Entergy Services, Inc.; Florida Power & Light Co.; Metropolitan Edison/Pennsylvania Electric Co.; Montana Power Co.; Northern States Power Co.; Otter Tail Power Co.; Pacific Gas & Electric Co.; The Southern Co.; Tampa Electric Co.; Union Electric Co.; Washington Water Power Co.; Wisconsin Electric Power Co.; and Wisconsin Public Service Corp.

57/ Infrastructure Owners Comments at pg. 11.

58/ See, *e.g.*, BellSouth Comments at pg. 14; EEI/UTC Comments at pg. 6; NU Systems Co. Comments at pg. 2; NYNEX Comments at pg. 13; Ohio Public Utilities Commission Comments at pg. 12; Ohio Ed Comments at pg. 18; Time Warner Comments at pg. 13; and US West Comments at pg. 16.

59/ General Communications, Inc. Comments at pg. 3; and, MCI Comments at pp. 21-23.

commentors embraced, as well.[60] To ensure nondiscrimination, AT&T suggested that the Commission require that pole attachment rates be tariffed and imputed in local service rates. AT&T also suggested that utilities provide, on request, cable plats and conduit prints showing the nature and location of various pathways.[61]

Some commentors argued that the Commission's authority to mandate nondiscriminatory access to pathways was secondary to state regulation, and that the Commission could not regulate access to pathways if states regulate access to pathways.[62] Others suggested that access to pathways should be a matter of negotiation between the pathway owner and the party wishing to access such pathways.[63] The 1996 Act, however, does not carve out such exceptions. Simply put, discriminatory access to pathways is not allowed under the 1996 Act when states regulate pathways or because the utilities involved have negotiated a particular access agreement allowing access to their pathways. The 1996 Act prohibits discriminatory access.

60/ See, *e.g.*, ACSI Comments at pg. 5; ALTS Comments at pg. 7; AT&T Comments at pg. 16; Bell Atlantic Comments at pp. 13-14; Delmarva Comments at pg. 8; Frontier Comments at pg. 6; GTE Comments at pg. 23; GVNW Comments at pg. 9; NextLink Comments at pg. 7; Sprint Comments at pg. 16; Telecommunications Resellers Association Comments at pg. 13;Virginia Power Comments at pg. 6; and, Pacific Telesis Comments at pg. 21.

61/ AT&T Comments at pp. 19, 22-23.

62/ See, *e.g.*, Ameritech Comments at pp. 33-35; Bell Atlantic Comments at pg. 13; NYNEX Comments at pg. 11; and, Rural Telephone Coalition Comments at pg. 11

63/ See, *e.g.*, Infrastructure Owners Comments at pp. 7, 15-16.

Nondiscriminatory Access to Pathways is not a Taking. Some commentors argued that a Commission requirement of mandatory access may be an unconstitutional taking of property.[64] It is important to emphasize, however, that prohibiting discriminatory access to pathways, as required by Sec. 224(f), is not an unconstitutional taking.

The facts and arguments of the *Centel Cable Television*[65] case parallel the Constitutional arguments made by some commentors. In *Centel Cable Television*, a developer attempted to plat utility easements as private rights of way in order to deny a cable television company access to those easements. Basically, the developer's utility easement allowed access to Florida Power and Light, Southern Bell and St. Lucie West Utilities for video services. St. Lucie West Utilities was affiliated with the developer and the developer intended that St. Lucie West Utilities be the exclusive provider of cable television services even though both Centel Cable Television and St. Lucie West Utilities had the authority to provide cable television services. The developer allowed Florida Power and Light and Southern Bell to have access to use the private road system in the development to gain access to the public utility easements to connect service to customers. When Centel Cablevision attempted to use the same private roads to access the dedicated public utility easements and install its cable television lines, the developer prohibited their entry. Centel Cablevision sued for and was granted a permanent injunction prohibiting the developer from

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64/ See, *e.g.*, Cincinnati Bell Telephone Comments at pg. 9; EEI/UTC Comments at pp. 4-5; GTE Comments at pg. 24; Rural Telephone Coalition Comments at pg. 14; Owners Comments at pg. 10; US West Comments at pg. 16; and, Virginia Power Comments at pg 4.

65/ *Centel Cable Television Co. of Florida v. Thomas J. White Development Corporation*, 902 F.2d 905 (11th Cir. 1990).

blocking its access to the development and public utility easements. On appeal, the Court upheld the District Court's grant of an injunction and rejected the developer's arguments that provisions of the Cable Act that allowed multiple service providers was an unconstitutional taking.

The Supreme Court has observed that the case law regarding takings has "generally eschewed any set formula for determining how far is too far, preferring to engag[e] in ... essentially ad hoc, factual inquiries."[66] Even though the Court has acknowledged that no single test exists for determining when a regulation becomes a taking, it has identified four major factors that it considers significant:[67]

1. **Physical Invasion**. Regulations that compel the property owner to suffer a physical "invasion" of his property are often considered a taking.[68]

2. **Destruction of Economic Value**. Regulations that destroy the economic value of property or deprive a property owner of all economically viable uses of his property have been viewed as takings.[69]

3. **Investment Expectations**. Regulations that interfere with the investment expectations of property owners may be considered takings.[70]

66/ *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886, 2893 (1992).

67/ See, *Multi-Channel TV v. Charlottesville Quality Cable Corporation*, 65 F.3d 1113, 1123 (4th Cir. 1995)

68/ *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886, 2893 (1992) citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982)

69/ *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980).

70/ *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886, 2895 fn. 8 (1992).